

REMARKS

Reconsideration of this application is respectfully requested in view of the foregoing amendment and the following remarks.

Claims 1-6 and 21 remain pending in this application. Claims 1, 3, and 4 have been amended, and new claim 22 has been added hereby. Support for the new and amended claims may be found in the original claims, the drawings, and the specification, for example at page 14, lines 10-12. Claim 3 was amended to correct typographical errors. No new matter enters by this Amendment. Upon entry of this Amendment, claims 1-6 and 21-22 will be pending, and for the reasons stated below, Applicant respectfully submits that these claims are in condition for allowance.

Applicant acknowledges with appreciation the indication of allowable subject matter in claims 4-6, 11-13, and 17-21. Claims 7-20 have been cancelled without prejudice or disclaimer in the present application and are being re-presented in a continuation application. Claim 4 has been rewritten in independent form, including the limitations of the base claim and any intervening claims therein. The rewritten claim obviates the objections set forth in the Office Action. Therefore, Applicant respectfully submits that claims 4-6, 21, and new claim 22 (dependent on claim 4) are in condition for immediate allowance.

Claims 1, 2 and 7-10 were rejected under 35 U.S.C. § 102(b) as being anticipated by Jobe (U.S. 5,787,713), claims 14 and 15 were rejected under 35 U.S.C. § 102(e) as being anticipated by Oberlander (U.S. 6,554,852), claim 3 was rejected under 35 U.S.C. § 103(a) as being unpatentable over Jobe, and claim 16 was rejected under 35 U.S.C. § 103(a) as being

unpatentable over Oberlander in view of Archuleta *et al.* (U.S. 5,425,407). In view of the cancellation of claims 7-20, the rejections directed to those claims are not addressed herein.

To advance the prosecution of this application, Applicant has elected to amend the product claims with the features deemed allowable in claim 4. Applicant reserves the right to pursue prosecution of the subject matter of the original claims at a later time. In connection with these amendments, Applicant notes that amended claims 1-3 are distinguishable over the art of record for the following reasons and those set forth in Applicant's prior response.

To emphasize the features of the staple, independent product claim 1 has been amended to recite limitations of method claim 4, to clearly establish that the staple controls the epiphyseal plate and accommodates the growth of the bone in order to prevent the staple from being expelled by the bone during growth.

With respect to the rejections of claims 1-3 over Jobe, Applicant maintains that Jobe neither discloses nor suggests the use and design of a staple for controlling the epiphyseal plate and for accommodating the growth of the bone in order to prevent the staple from being expelled by the bone during growth. The mere reference to "encourage distraction" in column 10, line 7 of Jobe is not enough to show that Jobe had designed his staple for use in a bone for controlling growing, with the outwardly directed legs being capable of accommodating the growth of the bone. All references to the behavior and function of the staple made by Jobe indicate that the aim of the staple is just to enhance retention into the bone tissue. The staple of the invention is therefore quite different from the one of Jobe.

Additionally, there is nothing described by Jobe in connection to the main function of the cross bar other than the purpose thereof to retain a tissue against the bone. The cross bar of the present invention, however, has been constructed and designed to arrest and control the growth plate while the legs are constructed for exerting an expansion force into the bone far from the periphery thereof, as recited, for example, in claim 1. Significantly, the staple of the present invention has been designed to control the growing of a bone by arresting the undesired growing (at the bone's periphery) and facilitating the desired development of the malformed bone (at a distance from the bone's periphery). This is clearly different from the device of Jobe.

Thus, it is clear that the construction, function, purpose and aim of the staple of the present invention is very different from the description in the Jobe patent, and therefore, Applicant respectfully requests that the rejections of claims 1-3 over Jobe be withdrawn.

In view of the foregoing all of the claims in this case are believed to be in condition for allowance. Should the Examiner have any questions or determine that any further action is desirable to place this application in even better condition for issue, the Examiner is encouraged to telephone applicants' undersigned representative at the number listed below.


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Respectfully submitted,

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